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***Native Title Act 1993: implementation
issues for resource developers***

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ABSTRACT

There is little documented evidence that the *Native Title Act 1993* (NTA) hampers mineral, oil and gas exploration and production because few genuine attempts have been made to work within the existing framework. From a public policy perspective and utilising an economics framework, this paper discusses the rationale and associated risks of the strategy of interested parties in challenging the effectiveness of the NTA. The analysis focuses on statutory provisions for a future acts regime and the right of negotiation under the NTA; provisions with potential to reduce transaction costs and enhance certainty are outlined. It is suggested that, rather than playing within the rules established under the NTA, most parties are focused on changing the rules. It is possible, however, to operate within the existing framework and extract gains from trade; the Mt Todd Agreement is discussed as an example. In conclusion it is argued that while the rules might need some alteration, and specific recommendations are made, legislative amendment will require the concurrence of all parties. Continued strategic behaviour, and associated avoidance behaviour by resource developers, is a high risk strategy that might result in net long-term losses for all parties.

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Foreword

Between March and May 1995 the Centre for Aboriginal Economic Policy Research (CAEPR) sponsored a thematic seminar series titled 'Policy Aspects of Native Title'. The following eight seminars were presented:

- 'Relative allocative efficiency of the *Native Title Act 1993* and the *Aboriginal Land Rights Act 1976*' by Siobahn McKenna (March).
- 'Resource development agreements on Aboriginal land in the 1990s: features and trends' by Ciaran O'Faircheallaigh (March).
- 'Negotiations between Aboriginal communities and Mining companies: structures and process' by Ciaran O'Faircheallaigh (April).
- 'Tourism enterprise and native title: the Tjapukai Dance Theatre, Cairns' by Julie Finlayson (April).
- 'Funding native title claims: establishing equitable procedures' by Jon Altman and Diane Smith (April).
- 'Native title and land management' by Elspeth Young and Helen Ross (April).
- '*Native Title Act 1993*: latest developments and implementation issues for resource developers' by Jon Altman (May).
- 'Native title and regional agreements: the Kimberley case' by Patrick Sullivan (May).

Five of these seminars have now been revised into *CAEPR Discussion Papers Nos 85-89*. Of the others, Siobahn McKenna's seminar was published earlier as *CAEPR Discussion Paper No. 79* and Jon Altman and Diane Smith's seminar was published as 'Funding Aboriginal and Torres Strait Islander Representative Bodies under the *Native Title Act 1993*', (Issues Paper No. 8, *Land, Rights, Laws: Issues of Native Title*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra).

Owing to the pressing public policy significance of the issues addressed in this series, these discussion papers are intentionally exploratory and aim to disseminate information to a wider audience than that able to attend the seminars at the Australian National University.

Jon Altman
Series Editor
July 1995

The High Court's Native Title decision of 1992 is now nearly three years old; it took 18 months for the *Native Title Act 1993* (NTA) to be formulated and passed and a further 15 months elapsed before the High Court endorsed its constitutional validity. The latest significant development in the native title saga is that native title as a legitimate form of land ownership has been affirmed. To continue to challenge this law, while possible, would certainly appear futile, and ultimately counter-productive. However, this seems to be the precise strategy being pursued by a number of interested parties and it is the rationale, and associated risks of such a strategy, that are the central theme of this paper.

Implementation issues are examined here from a public policy perspective using an economics framework. The paper begins by outlining the analytical framework to be used and identifying, by way of background, the range of interests involved. The focus of the analysis is very much on future acts, and the right of negotiation, rather than on past acts and validation. Hence the NTA's future acts regime is described in some detail, with an emphasis on statutory provisions aimed at minimising delay and providing certainty. Next, four features of the NTA that appear to have the potentiality to generate transactions costs and reduce certainty are outlined. Paradoxically, three of the four were initially perceived as wins to resource developers in the lead-up to passage of the NTA. Three broad scenarios are then examined. First, it is suggested that rather than playing within the rules (the NTA), most parties are focusing excessively on getting the rules changed (amending the legislation). Second, it is argued that potential exists to work within the existing NTA framework and extract gains from trade. It is argued in conclusion that while the rules might require some change, legislative amendment will require the concurrence of all parties. In the meantime, continued strategic behaviour, and associated avoidance behaviour by resource developers, is a high risk strategy that might result in net long-term losses for mining and petroleum industries.

Analytical framework

An independent academic commentator needs to ground an argument within an analytical framework that extends beyond mere opinion. The broad framework used here is a standard economic framework, informed by the fundamental theorems of welfare economics. It is recognised, for example, that for optimal outcomes to occur under the existing statutory framework (or under a different 'amended' framework) transactions costs must be minimised (Coase 1960) so that the two key parties, in this case resource developers (grantee parties in the NTA) and native titleholders or claimants, can be free to negotiate a division of rents that is acceptable to both. This is the path to exploration, mining and economic development. Of course, if valuation of not mining for native title holders exceeds the potential financial rewards to them from mining, then non-mining will,

according to conventional welfare economics, be the optimal outcome. The abstract model, as such, suggests that there are two parties and that neither engage in strategic behaviour. This term is used in the economic property rights sense referring to the revealing of false valuations in the short-term anticipating net future long-term gain (see McKenna 1995).

The analysis though is not located in an abstract Coasian world: rather it is heavily qualified by the realpolitik behaviour of a range of interest groups and interested parties. Even a gross simplification suggests that there is enormous diversity among the two main interest groups, resource developers and indigenous parties, and that both are currently engaging in strategic behaviour. What is even more significant, and requires the grounding of the analysis in a version of political economy or public choice theory, is that governments (in all their diversity) are not neutral arbiters and State and Territory governments in particular are also participating in strategic behaviour with the primary objective of having the NTA amended.

The three broad groups that are identified as actors in this analysis can be typified as indigenous parties, resource developers and governments. While it is essential to greatly simplify complexity, it is equally worthwhile to highlight not only the diversity that exists within each of these categories, but also broad similarities in objectives.

Indigenous parties

A feature of the indigenous Australian polity is its diversity, especially between geographic regions; another feature of such traditionally small-scale societies is a propensity for fragmentation. The Mabo High Court judgment and subsequent native title legislation increases both diversity and potential to political fragmentation. On top of statutory land rights regimes and associated property rights established in most States and Territories, a new native title regime is superimposed. Indigenous Australians with interests in land (besides those who own land under freehold title), now include groups whose native title in land might be recognised and groups whose native title has been extinguished. Furthermore there is a possibility that limited native title might be recognised to co-exist with commercial pastoral leasehold interests. Native title parties might be variably represented by Representative Bodies (many of which are also statutory or non-statutory land councils), non-representative bodies (that is, bodies not determined as representative by the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs), prescribed bodies corporate and as individuals. It is assumed in the context of the economics framework used here that indigenous parties are rent maximisers: in most cases this will mean that they are pro-development, but in some cases indigenous interests will be maximised by stopping development.

Resource developers

Resource developers are not as diverse as indigenous parties, but neither are they as homogeneous as key industry lobby groups like the Minerals Council of Australia (formerly the Australian Mining Industry Council (AMIC)) and the Chamber of Mines and Energy of Western Australia present them. Resource developers fall into a number of categories with some cross-cutting similarities. A key distinction, in the native title context, can be drawn between the mining industry and the petroleum industry. One difference is that with the former, exploration and mining are distinct phases often differentiated in mining law: companies are issued exploration licences in contrast to mining leases. With the latter, exploration is rarely differentiated from production. Another difference is that petroleum exploration and production has a low environmental impact, especially compared to bulk sampling exploration and open-cut mineral production. This will potentially affect compensation payments. A final issue is that approximately 90 per cent of oil and gas production in Australia occurs offshore, where native title rights are currently less clearly recognised, in marked contrast to mining which mainly occurs onshore (see Vickery 1995).

Another important distinction can be made between three categories of resource developers: big and small companies and those who specialise in mineral exploration. Big companies typically have multinational interests and have significant stakes in the global mining industry. From Australia's perspective, they can easily go offshore, aim to minimise sovereign risk, seek to maximise rate of return on investors' dollars and spread their exploration, mining and investment portfolios. Small companies on the other hand operate primarily domestically; exploration specialists similarly operate locally and can be extremely small.

In behavioural terms, it is self-evident that the options of smaller companies are far more circumscribed than those of larger companies: they must truck and barter with all land holders, including native title parties, or fail. For a time, risk minimisation will result in avoidance of land, especially unalienated Crown land, where native title might be recognised, but in the longer-term exploration activity must extend beyond the 29 per cent of Australia that is freehold land. An aspect of the future acts regime and the unexpedited right to negotiate (RTN) framework in the NTA seems to inadvertently distinguish between big and small companies: private bargaining between resource developers and native title parties under s.33 allows rent-sharing. However, if agreement cannot be reached within specified time frames (four months for exploration, six months for mining) then an arbitral body must determine if the act may proceed and assess compensation. However, calculation of compensation at this stage cannot consider rent-sharing as a possibility (s.37(2)). Under such circumstances it is likely that the incentive for small companies will be to avoid delay, while the incentive to large companies will be to seek arbitration.

McKenna has argued that with a bilateral monopoly and two parties behaving strategically, arbitration (a liability rule) might generate greater allocative efficiency than private bargaining (McKenna 1995).

Governments

The Commonwealth government is the only party that is committed to stand by the NTA, a statutory framework that it established. The role of State and Territory governments looms large though, because despite the High Court decision of 16 March 1995 that affirmed the constitutional validity of the Commonwealth's NTA, it is this level of government that has ultimate authority over land management issues.

Standard economics suggests that governments should not be interested parties and that their role should be limited to that of neutral arbiters that establish statutory regimes for optimal efficiency, taking equity considerations into account, and then take a back seat. However, despite the fact that almost all States and Territories have passed complementary legislation that validates past acts, none have as yet established a future acts regime. An alternative view from political theory of more relevance here might be that governments are always interested parties operating as defenders of the public interest.

Even here though there is enormous diversity. It is generally unchallenged that Western Australia is most affected by the NTA. This is partly because it is the only mainland State without statutory land rights. But it is also because most of Australia's unalienated Crown land (90 per cent) over which native title is least likely to be extinguished is in this State. It is no doubt concerned that native title, and the associated RTN, will be recognised over much of the State. Furthermore, it is the State where most mineral exploration in Australia is undertaken as has been amply documented by the Chamber of Mines and Energy of Western Australia (1994). The Western Australian Government is vehemently opposed to the NTA; it challenged its validity in the High Court and lost and it now seems committed to demonstrate the NTA's unworkability by clogging the Commonwealth's National Native Title Tribunal (NNTT) with exploration proposals, rather than setting up a State future acts regime as allowed under s.43 of the NTA. Similarly, the former Fahey Government in New South Wales was unwilling to work within the NTA's framework being the only party not to ratify a number of mediated settlements. The Northern Territory Government is the latest to oppose the NTA, partly in protest at the NNTT's registration of a native title claim over parts of Alice Springs, but more significantly because of concern about excessive Commonwealth powers in relation to land management issues. It is likely that nearly 50 per cent of the Northern Territory will be Aboriginal land under the auspices of the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT Land Rights Act) with statutory provision for traditional owners to veto exploration and mining over this land. It is possible that if native title is

recognised as extant over pastoral leasehold land, resource development on much of the remainder of the Northern Territory will be subject to a right of negotiation.

The statutory future acts regime: key features

The principal aim of the NTA in relation to resource development is to validate all past acts; to provide a right of renewal for all existing validated mining leases; and to ensure that if compensation is required for invalid past acts then miners are indemnified by government. These are all big and important wins for the mining and petroleum industries; it was, after all, industry concerns about invalidity that were to a great extent the precursor to government legislative action on the High Court judgment in *Mabo No. 2*. Furthermore, the NTA makes it quite clear that exploration and mining are permissible future acts because both are acts that can occur on private (freehold) land. The only clear win for indigenous interests in the NTA is that most future acts that occur on land where native title is, or may be, determined is subject to a RTN, unless subject to an exclusion (s.26).

The Commonwealth has established a minimum benchmark regime for future acts but this, as will be shown below, is a far from perfect regime especially in terms of clarity of property rights. Two initial practical problems exist. Commonsense suggests that for the NTA to work effectively, the Australian continent needs to be mapped into those parts where native title continues to exist and those parts where it is extinguished. Extinguishment has occurred over all freehold land; the situation over other lands, especially pastoral leasehold where a statutory reservation (that recognises a form of native title) is in place, but also national parks and even unalienated Crown land that might have been previously alienated (as in the *Waanyi* claim) remains unclear. Current claims before the NNTT and test cases before Federal and High Courts will clarify most these uncertainties. The key practical problem here is not that exploration and mining might be impermissible future acts, but rather that resource developers need to identify native title holders or claimants with whom to negotiate (AMIC 1994). If this is a costly process, either in terms of time or dollars, then transactions costs will be deemed high. It is clear that mapping the Australian continent to facilitate negotiation with certainty will take many years.

The issue of the cost of searching for parties with whom to negotiate falls squarely within Coase's definition of transactions costs (Coase 1960). But there are a range of mechanisms in the NTA's future acts regime that seek to either limit delays associated with negotiation or to provide bypass options.

The former broad approach is incorporated in RTN provisions (s.26) and a requirement for government to notify native title parties, as well as others,

about proposed future acts to make them valid (s.28, s.30). Time frames are stipulated in the NTA for private bargaining (four months for exploration, six months for mining) and if this fails, for arbitration and mediation (similar time frames again). If arbitration fails, options exist for ministerial override within a further two months. As noted above, for native title parties, private bargaining will invariably be preferable to arbitration from a financial incentives perspective owing to the existence of a no rent-sharing proviso at s.37(2).

The latter broad approach is evident in a number of options. Of great potential significance is provision in the NTA that certain future acts may be excluded from the RTN under s.26(4) if the Commonwealth Minister is assured that the Act will have minimal effect on any native title concerned, that Representative Bodies and the public have been notified, submissions have been invited and that, if the exclusion is determined, native title parties are consulted about access. It is generally recognised that it was the Commonwealth's intent that exploration tenures be excluded from the RTN (Keating 1993: 2880) and that implementing exclusion provisions are fundamental to the workability of the NTA's future acts regime. Other provisions include the option for developers to make non-claimant applications to the NNTT (s.24) with the aim of either having a determination that native title claimants are absent or alternatively 'flushing out' claimants within two months. Notification procedures also have an expedited procedures option (s.29(4) and s.32) when the government is sure that a permissible future act will have limited impact on indigenous communities. There is also the option to undertake low impact future acts (s.234) while awaiting determination, although it is unclear what exploration activity might fall into this category. Of crucial importance is the automatic renewal of existing interests (s.25) and stipulation that negotiations may not be re-opened (s.40).

Perceived wins and losses for resource developers and their consequences

Utilising an economics framework and the proposed future acts regime sketched out above, four key issues loom large. Interestingly, three of these were initially regarded in negotiations prior to passage of the NTA as wins for resource developers (and losses for indigenous interests), but now appear to have negative impacts; the last is generally interpreted as a loss for resource developers (and a win for indigenous interests).

The right to negotiate

The mining industry via AMIC fought hard to ensure that the right to veto exploration in the NT Land Rights Act was not incorporated into the NTA. This right of veto has been accurately depicted by the Industry Commission (IC) as a *de facto* mineral right (IC 1991). Interestingly though, the IC argued persuasively, in somewhat apolitical economic

terms, that this de facto mineral right was a very murky property right that should be replaced with de jure mineral ownership (that is, full indigenous mineral ownership). The IC case was that clearer property rights in minerals would result in efficiency gains as resource developers and Aboriginal traditional owners could bargain more directly and reveal their 'market valuations' more accurately. In 1993, indigenous interests reluctantly acquiesced and allowed the replacement of a right of veto with the far less clear property right inherent in the RTN (Altman 1994a). It was the mistaken view of the mining lobby that the NT Land Rights Act was operating suboptimally because of the right of veto. It was in fact operating suboptimally because of legal uncertainty about the link between approvals to allow exploration and approvals to allow mining (conjunctive versus disjunctive agreements) and an unwillingness on the part of all parties to meet negotiation deadlines stipulated in statute (Altman 1994b). If the problem with the NT Land Rights Act can be typified as being linked to unclear property rights in minerals, then these rights are even less clearly defined in the NTA: what was perceived as a win for resource developers may in fact end up as a loss.

Limited rent sharing provisions

The NT Land Rights Act provides indigenous interests with an equivalent, appropriated from consolidated revenue, to the statutory royalties raised from mining or oil and gas production. This provision was based on an historical precedent dating back to 1952 (see Altman 1993). Additional payments above statutory limits could also be negotiated and have been evident in all mining agreements since passage of land rights legislation. This option to share rents is linked to the existence of the right of veto. The IC recommended that de jure mineral rights should also allow continued payment of royalties; however, it was recommended that a larger proportion of statutory royalties should be paid to traditional owners, beyond the 30 per cent guaranteed by statute to those in 'areas affected' by resource development projects.

The NTA goes part way to rectifying a problem identified in the NT Land Rights Act by the IC; where rents or compensation is payable it goes directly to native title holders (IC 1991). Hence appropriate incentives are in place for native title parties to benefit directly from resource development and consequently to be pro-development. However, the resource developers argued successfully that statutory royalty equivalents should not be paid to native title parties, even though such payments were at zero net cost to them. The rent sharing possible in the NTA under s.33 only refers to 'negotiated' payments, typically in the limited range of a royalty of 1.5 to 3.0 per cent ad valorem in the Northern Territory. While the absence of statutory royalty equivalent payments in the NTA was again perceived as a win to resource developers, perhaps because it appeared to break a nexus between interest in land and mineral rights, it nevertheless provides limited incentive for native title parties to be pro-development.

State governments may have played a crucial part in this too: the payment of royalty equivalents from consolidated revenue would have required a degree of transparency in royalty revenue-raising effort. There is historical evidence that States and Territories can behave strategically here: because they are fundamentally pro-development, they are sometimes willing to forego royalty revenue and allow mining company super-profits to expedite mining, while seeking economic growth mainly from multiplier effects. Both resource developers and State governments were probably keen to maintain their room to manoeuvre with each other in relation to royalty concessions; this would have been eroded by statutory royalty sharing arrangements in the NTA.

Absence of statutory bodies with whom to negotiate

In negotiations about native title, both State governments (especially Queensland) and resource developers were adamant that there should be no mandatory requirements in the NTA to negotiate with native title parties via stipulated statutory bodies. Again there was a perception, this time supported by the IC, that resource developers and native title parties should be able to strike private deals without involving intermediary statutory bodies like land councils (IC 1991). Again there was a misguided perception that land council involvement exacerbated inefficiencies in the NT Land Rights Act. Keating made it clear that Representative Bodies would not operate as monopolies, with implied associated inefficiencies (Keating 1993: 2881). McKenna identifies the absence of mandatory functions for Representative Bodies as a potential source of increased efficiency from the NTA compared with the NT Land Rights Act (McKenna 1995).

This apparent win for both resource developers and the States is also likely to generate costs and inefficiencies. The NTA gives Representative Bodies a discretionary role in representing native title parties (s.203); conversely, prescribed bodies corporate can represent themselves or be represented by 'non-representative' or undetermined bodies. It appears that in the formulation of the NTA, there was too much concern about the potential political power of land councils and too little with the inherent potential efficiencies of a one-stop shop (or regulatory monopoly) for negotiations. Part of the problem here has been an overemphasis on the activities of the two major Northern Territory land councils without due recognition being given to their independent funding base (from statutory royalty equivalents); the likely diminution of their national political profile with the establishment of numerous additional Representative Bodies; and a poor understanding of the potential for disputation over land matters in Aboriginal societies (Edmunds 1995).

There appears to be a strong public goods argument that well-funded Representative Bodies with large jurisdictions, mandatory statutory or regulatory powers and sufficient organisational scale may be preferable to

a plethora of smaller, and supposedly leaner and more competitive, 'representative' bodies with limited staff resources (Altman and Smith 1995). The flexibility in statute is evident in the potential for overlapping geographic representative jurisdictions, but this too can have enormous potential costs in terms of efficiency. The antipathy of resource developers to the Northern Territory land councils system and principled stances on flexibility and competition has a cost. If certainty, especially in negotiated contracts, is important then it seems that statutory bodies with mandatory functions provide a means to deliver such certainty. This though does not mean that native title parties cannot participate directly in the negotiation process. Increasingly, the RTN is being identified as the problem rather than the absence of an efficient framework for negotiation. The potential for Representative Bodies to provide certainty is being overlooked. As French notes, model agreements between resource developers and Representative Bodies may speed up negotiations (French 1995: 25).

Recognition of claimant rights

The extension of the RTN to registered native title claimants (s.30), as distinct from determined native title holders, can be seen as a win for native title parties, and a potential loss to resource developers. In terms of transactions costs, there is a potential for some delay here. But it should be noted that if compensation or rent-sharing payments are negotiated with claimants, such moneys must be held in trust (s.52) until a determination is made. Transactions costs might be more than offset here with future risk minimisation benefits. In terms of certainty, this requirement reduces the risk for resource developers of potential future invalidity or of potential requirement to make compensation payments that will not be reimbursed by government.

Shifting the goalposts before the match begins: strategic behaviour and associated risks

The regulatory framework created by the NTA is not perfect and there are some inherent delays, intentionally established in law, to provide an opportunity for negotiation with native title parties. To some extent increased transactions costs are inevitable as they would be if other extant forms of land ownership over unalienated Crown land, be it freehold or leasehold, were suddenly recognised. There is little documented evidence that the NTA does hamper exploration, partly because few genuine attempts have been made to work within the existing legislative framework (AMIC 1994). Recent data indicates that only a small number of native title claims, non-claimant applications and test cases have been heard: both interest groups and State and Territory governments are continuing to cautiously await the establishment of precedents (see Altman and Smith 1995).

Such avoidance behaviour and risk minimisation on the part of resource developers is understandable, but strategic behaviour that exaggerates potential transactions costs and uncertainty could have longer-term costs. First, there is a real possibility that the strategic behaviour itself will be increasingly recognised, and documented, as the generator of transactions costs. In short, it may not be the rules that are creating transactions costs, but the refusal to play by them. Second, there is a distinct possibility that resource developers will be seen as anti-native title rather than opponents of the statute's operations. It is noteworthy in this regard that industry statements are increasingly emphasising a pro-native title stance, but with continual concern about the workability of the Commonwealth's statutory framework (see Ewing 1994; Chamber of Mines and Energy of Western Australia Inc. 1994; Davies 1995; Fussell 1995). Third, there is a possibility that delays in negotiation, under the guise of strategic behaviour, will have real longer-term costs. Because past acts have been validated and renewals guaranteed, there is no evident downturn in exploration and mining since the Mabo High Court judgment (AMIC 1994). But even normal processing of exploration licence applications has a long lead time, varying from one to three years between States. If exploration licences are not processed then there is a distinct possibility that there will be a hiatus in resource development in the future: mining and, to a lesser degree the petroleum industry (and ultimately the Australian economy) will suffer, but it is unclear if it is the NTA that will be at fault. The costs of this strategic behaviour will be most acutely felt by small exploration and mining interests unless they move quickly to negotiate with native title parties under the NTA's future acts regime; large companies will be at greater liberty to shift their focus offshore.

It is not just resource developers that are behaving strategically. There is a growing recognition among indigenous interests that the potential financial returns from NTA in terms of rent sharing is far less significant than benchmarks established by land rights law, especially in the Northern Territory. Hence native title parties also have a vested interest in demonstrating that the existing statutory future acts regime is unworkable, even though in reality the cards are stacked against them given the potential financial costs of delay for native title parties.

State Governments too are behaving strategically. For example, the Western Australian Court Government established its own native title statute that was ruled as discriminatory and unacceptable by the High Court. Now it is threatening to overload the NNTT with thousands of non-claimant applications to make the existing framework administratively unworkable and in need of major amendment. The risks for State governments in such strategic behaviour has analogies with those for miners: there is a distinct possibility that it will not be the NTA that is creating uncertainty, but ongoing challenges. Such a strategy will be expensive in terms of taxpayer dollars and possibly politically unpopular.

There are risks of real opportunity costs in terms of forgone development, at the State level, again with associated political costs. From the resource developers perspective it is probably good strategy to avoid Commonwealth/State disputation, rather than forming alliances with the States. All parties need to adjust to the idea of native title and playing by the rules.

Working within/with the existing system or how to play by the rules and extract gains from trade

An alternative strategy to continual attempts to challenge existing law, is to work within it and establish bona fides. Unfortunately, owing to the strategic behaviour of all parties, there are few examples of agreements struck between miners and indigenous interests since the passage of the NTA.

One agreement that has been discussed in some detail elsewhere that was completed in 1993 is, however, particularly instructive (see Altman 1994a). The agreement between Zapopan and the Jawoyn Association for gold mining at Mt Todd demonstrated that if the two key parties, indigenous interests and resource developers, are willing to negotiate, then governments (in this case the Commonwealth and the Northern Territory Government) will be willing to both underwrite development and expedite administrative arrangements to achieve broader policy objectives. It is also noteworthy that the Northern Land Council (now also a determined Representative Body) was a party to this Agreement.

The Mt Todd case is replete with lessons for resource developers that can be operationalised under the NTA's future acts regime. It indicates that if resource developers, in this case a small company Zapopan, are willing to truck and barter, to be creative and proactive and to get the process right, then outcomes in the form of successful and profitable ventures will occur. What is especially pertinent in the Mt Todd case is how Zapopan was able to look after its own interests by drawing in government resources and indigenous equity participation. It has also been provided with commercial certainty by the Northern Land Council which indicates that rather than oppose or undermine Representative Bodies, resource developers could utilise these bodies to undertake the arduous task of identifying appropriate native title parties. Mt Todd demonstrates how the stakeholder model can operate and how equity participation by indigenous interests has the potential to draw them into resource development projects as active participants. It ultimately illustrates how a small resource developer was able to play by the rules, admittedly new rules that require a change of mind-set, and extract significant gains from trade rather than losses from standoffs, delays and potential legal proceedings.

It is not only resource developers who need to play by the rules to extract gains from trade: indigenous parties and governments must also play their

part. As intimated above native title parties are also behaving strategically, but in the short-term it may be preferable for them to rent seek using the limited leverage provided by the RTN in the NTA rather than assume higher rents will be available in the longer-term. Members of the Jawoyn Association have already benefited considerably from the Mt Todd Agreement, initially from concessions that were extracted from government than from Zapopan, but more recently from employment at the mine.

State governments too have a range of options under the existing statutory framework. S.43 of the NTA allows State governments to establish credible alternative future acts regimes that are suited to particular regional requirements. Such alternatives must use the NTA as a minimum benchmark, but there is potential to use existing State institutions to facilitate negotiation between resource developers and native title parties. Of especial potential significance is the option to establish complementary State future acts regimes with exclusions. Much of the practical problem with implementing an exclusions regime within the NTA has been variability in mining statutes between States. Tailor-made alternative arrangements, dovetailed with amendments to mining and energy laws could greatly expedite development. For example, different forms of exploration could be defined, with some being eligible for exclusion from the RTN. Coordinated and systematised time frames under State mining statute and State future act arrangements could see the concurrent lodgement of exploration licence applications with mines departments, and non-claimant applications with State-based tribunals resulting in a far quicker approval turn around time. Like resource developers, State governments need to seek creative solutions to a new form of land tenure.

The future: how to set up rules that please all parties and maximise efficiency while moving beyond the meta-game

The economics framework used in this paper and the analysis of both the current and potential political strategies of all parties indicates that there are elements of the NTA's future acts regime that need to be recast. Some major changes that need to be considered, in my opinion, are as follows.

First, there is a need for property rights on land that might have native title over it recognised to be more clearly defined. This will allow more direct bargaining between developers and native title parties, clearer signals about rent sharing and valuations and greater incentives to native title parties to allow mining. The simplest mechanism available to achieve this objective is to introduce a once-only right to veto mining or petroleum production. Tradeoffs will be needed here. For example, in exchange for such better defined property rights, exclusions could be applied to all exploration, bar bulk sampling. Recourse to arbitration could remain if parties cannot come to private agreement, but s.37(2) of the NTA should

be deleted so that an arbitral body can consider rent sharing as part of a compensation package. Such a measure is essential to ensure a level playing field in negotiations between resource developers and native title parties especially if native title parties are pro-development, as implied by rent-seeking behaviour.

A second alternative proposal is that native title parties are provided with either a share or full access to the equivalent of statutory royalties. This equivalent could either be stipulated as a fixed figure in statute or else could be the full equivalent of any royalties paid with respect to projects on land held under native title. Each option has a risk for native title parties. The former option offers greater certainty, but potentially lower returns; the latter offers less certainty, especially if State governments provide royalty concessions to resource developers. These options will be costless to companies, yet will provide incentives to native title parties to allow development. Equivalents could be paid either by the Commonwealth or on a shared basis with the States. If non-negotiable financial returns from mining are stipulated in the NTA, native title parties and miners will be discouraged from behaving strategically and only non-financial terms and conditions like protection of sacred sites and access will be open for negotiation.

Third, from a resource development perspective, it is important that Representative Bodies are established as regulatory monopolies with statutory functions that include identification of parties with whom to negotiate. One of the key lessons from the operations of the NT Land Rights Act is that while industry lobby groups often articulate a preference to deal with traditional owners direct, individual companies prefer the certainty of dealing with statutory authorities. There is a strong public goods argument for monopolistic Representative Bodies, but this does not preclude direct bargaining between native title parties and resource developers. The greater issue with Representative Bodies for government is how their functions will articulate with those of other regional organisations like statutory and non-statutory land councils and, more significantly, Aboriginal and Torres Strait Islander Commission regional councils.

The analysis here suggests that currently all parties are engaged in strategic behaviour, participating in a meta-game. One of the key lessons that can be learnt from the nearly 20 years experience with the NT Land Rights Act is that statutory frameworks can operate suboptimally for years without any parties (including the Commonwealth Government) having the incentives or power to institute appropriate amendments (Altman 1994b). To institute change requires the mobilisation of all key stakeholders, including the Commonwealth. In my view the only means to ensure modification of the NTA is to work within the existing framework to demonstrate what is actually going wrong and then to seek a concurrence of diverse views about what needs to be changed for the benefit of all parties.

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